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10  
11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 DAVID L. DEFREES,  
14 SIMON GERSHON and  
FREDERICK RICH, in the right of and  
for the benefit of U.S. Aerospace, Inc.

15 Plaintiffs,

16 v.

17 JOHN C. KIRKLAND,  
18 LUCE, FORWARD, HAMILTON &  
SCRIPPS LLP,  
19 JERROLD S. PRESSMAN,  
KENNETH J. KOOCK,  
20 MICHAEL L. GOLDBERG,  
JAMES D. HENDERSON,  
21 HAL KOLKER,  
CHARLES S. ARNOLD,  
22 TUSA ACQUISITION CORPORATION,  
AMERICAN DEFENSE  
23 INVESTMENTS, LLC and  
DOES 1 through 10,  
24

25 Defendants,

26 and

27 U.S. AEROSPACE, INC.

28 Nominal Defendant.

Case No. CV 11-04272 GAF(SPx)

**VERIFIED FIRST AMENDED  
DERIVATIVE COMPLAINT**

**JURY TRIAL DEMANDED**

FILED  
2012 MAY 22 PM 01  
CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
LOS ANGELES  
BY \_\_\_\_\_

1 Plaintiffs David Defrees, Simon Gershon, and Frederick Rich (“Plaintiffs”),  
2 by and through their attorneys, derivatively on behalf of U.S. Aerospace, Inc.  
3 (“USAE” or the “Company”), allege upon personal knowledge as to themselves and  
4 their own acts, and upon information and belief as to all other matters, based upon,  
5 *inter alia*, the investigation conducted by and through their attorneys, which  
6 included, among other things, a review of Company filings with the Securities and  
7 Exchange Commission (“SEC”), news reports, press releases, and other publicly  
8 available documents regarding the Company and the Defendants, as follows:

9 **I. NATURE OF THE ACTION**

10 1. Plaintiffs, derivatively on behalf of Nominal Defendant USAE, seek  
11 relief for the damages sustained and to be sustained by the Company for  
12 wrongdoing committed between April 1, 2010 and the present (the “Relevant  
13 Period”) against:

- 14 a. John C. Kirkland (“Kirkland”) and Luce, Forward, Hamilton &  
15 Scripps LLP (“Luce”)<sup>1</sup> for breach of fiduciary duty, aiding and  
16 abetting breach of fiduciary duty, legal malpractice and corporate  
17 waste;  
18 b. Hal Kolker, the sole member of the USAE Board of Directors  
19 (the “Board”) at the date of the filing of the initial complaint in  
20 this action on May 18, 2011;  
21 c. certain former members of USAE’s Board, Jerrold S. Pressman  
22 (“Pressman”), Kenneth J. Kooock (“Kooock”), Michael L.  
23 Goldberg (“Goldberg”), and James D. Henderson (“Henderson”)  
24 (collectively, the “Former Director Defendants”), for breach of  
25 fiduciary duty, aiding and abetting breach of fiduciary duty and  
26 corporate waste;

27  
28 <sup>1</sup> In March of 2012, the Luce firm was acquired by McKenna Long & Aldridge  
LLP.

- 1           d.    the holders of USAE's Series E Preferred Stock, TUSA  
2           Acquisition Corp. ("TUSA") and American Defense  
3           Investments, LLC ("ADI") (the "Majority Shareholder  
4           Defendants"), for breach of fiduciary duty and/or aiding and  
5           abetting breach of fiduciary duty; and  
6           e.    Charles S. Arnold ("Arnold") for aiding and abetting breach of  
7           fiduciary duty.<sup>2</sup>

8           2.    By the acts alleged herein, Defendant Kirkland has violated numerous  
9           provisions of the California Rules of Professional Conduct, ignored irreparable and  
10          unwaivable conflicts between his client USAE and ADI, and subsumed his  
11          obligations to USAE in favor of the interests of ADI and the other Series E preferred  
12          shareholders.

13          3.    The Former Director Defendants, which were hand-picked by Majority  
14          Shareholder Defendant ADI, breached their fiduciary duties and aided and abetted  
15          Defendants Kirkland and Luce in their breaches of fiduciary duties by purporting to  
16          ratify Kirkland's wrongful conduct to the detriment of the Company and committed  
17          corporate waste by permitting the Company to issue millions of shares of Company  
18          stock to the Majority Shareholders without meaningful consideration, and by  
19          permitting millions of shares to be issued to purported "consultants", Omnicom  
20          Holdings, Inc. ("Omnicom") and Summit Trading, without meaningful  
21          consideration. As active participants in the alleged fraudulent acts alleged herein,  
22          any litigation demand made on the Former Director Defendants pursuant to Rule  
23          23.1 of the Rules of the Court of Chancery of the State of Delaware ("Chancery  
24          Court Rules") would have been futile.

25          4.    Moreover, the Majority Shareholder Defendants, ADI and TUSA,  
26          which control a majority of the USAE Board, have breached and continue to breach

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27          <sup>2</sup>       Defendants Kirkland, Luce, Pressman, Koock, Goldberg, Henderson, TUSA  
28          and ADI are collectively referred to herein as the "Defendants."

1 their fiduciary duties owed to the Company and the minority shareholders by  
2 insisting that the Company be placed into bankruptcy rather than accept financing,  
3 which could allow the Company to become profitable under the premise that the  
4 Majority Shareholder Defendants could emerge from the proceedings owning a shell  
5 company containing the necessary licenses to enter into government contracts and  
6 other valuable Company assets.

7 5. Also, Defendant Arnold has aided and abetted the aforementioned  
8 breaches of fiduciary duty by Defendants Kirkland and Luce, the Former Director  
9 Defendants and the Majority Shareholder Defendants by, among other things,  
10 misrepresenting to the Company that he and Defendant Kirkland owned USAE debt  
11 which was actually owned by another party. Defendant Arnold, along with  
12 Defendant Kirkland, then directed the Company to expand the Board and to appoint  
13 four of the Former Director Defendants to the USAE Board. The Former Director  
14 Defendants then granted Arnold's company, Summit Trading, an option to purchase  
15 5 million shares of USAE for no consideration. Defendant Arnold also participated  
16 in engineering a transaction which resulted in Defendants ADI and TUSA owning  
17 the majority of USAE's voting shares. Defendant Arnold's wife is the President and  
18 shareholder of TUSA. Finally, after Defendants Kirkland and Pressman engineered  
19 a sham settlement with Omnicom whereby Omnicom was issued 15 million shares  
20 of Company stock worth \$2.3 million without consideration to the Company,  
21 Defendant Arnold directed his employees to re-issue 4.5 million of those shares to a  
22 series of other entities.

23 6. Finally, Defendant Kolker, the only member of the USAE Board at the  
24 time of the initial filing of this action, May 18, 2011, was brought in to represent the  
25 interests of, and be beholden to, Kirkland, Arnold and the other Defendants  
26 following the resignation and/or termination of the other Board members when the  
27 wrongdoing described herein was brought to light. Indeed, Defendants Arnold and  
28 Kirkland initially introduced Defendant Kolker to USAE in early 2010 in order that

1 Defendant Kolker might provide financing to the Company. Defendants Arnold and  
2 Kirkland represented to USAE's then Chief Executive Officer, David Duquette, that  
3 Defendant Kolker had previously engaged in a number of business deals with  
4 Arnold and Kirkland. While he did not invest in the Company at that time, Arnold  
5 and Kirkland turned to him in March of 2011 in order to ensure that their interests  
6 would be protected.

7 7. Defendant Kolker signed, purportedly on April 29, 2011, and  
8 purportedly on behalf of USAE, documents entitled, "Mutual General Release" in  
9 an attempt to release Defendants Arnold, Goldberg, Henderson, and Koock from  
10 any and all liability for claims the Company has against them. Kolker also signed  
11 similar documents, purportedly on behalf of USAE, titled, "Settlement Agreement  
12 and Release" in an attempt to release Defendants ADI and TUSA from liability for  
13 any and all claims the Company has against them. Any litigation demand made on  
14 Defendant Kolker pursuant to Rule 23.1 of the Chancery Court Rules would have  
15 been futile given the fact that: (a) Defendant Kolker had prior business and personal  
16 dealings with other Defendants, including Defendants Arnold and Kirkland, and  
17 therefore was not and is not independent; and (b) Defendant Kolker's actions while  
18 serving as the solitary Board member of USAE, including the signing of the  
19 Releases, demonstrate that he was beholden to the Defendants.

## 20 II. JURISDICTION AND VENUE

21 8. This Court has jurisdiction over this action pursuant to 28 U.S.C.  
22 §1332(a)(1) in that Plaintiffs and Defendants are citizens of different states and the  
23 matter in controversy exceeds \$75,000, exclusive of interests and costs. This action  
24 is not a collusive action designed to confer jurisdiction on a court of the United  
25 States that it would not otherwise have.

26 9. Venue is proper in this Judicial District pursuant to 28 U.S.C. §1391(a)  
27 because a substantial portion of the events or omissions giving rise to the claims  
28 alleged herein occurred within this Judicial District. Moreover, Defendants have

1 received substantial payments in this Judicial District by doing business here and  
2 engaging in numerous activities that had an effect in this Judicial District.

### 3 **III. PARTIES**

#### 4 **A. The Plaintiffs**

5 10. Plaintiff **David L. DeFrees** is a citizen of the United States of America,  
6 is domiciled in Leavenworth, Kansas and has owned at all times relevant to this  
7 action, and continues to own, the Company's common stock.

8 11. Plaintiff **Simon Gershon** is a citizen of the United States of America,  
9 is domiciled in Merrick, New York and has owned at all times relevant to this  
10 action, and continues to own, the Company's common stock.

11 12. Plaintiff **Frederick Rich** is a citizen of the United States of America, is  
12 domiciled in Tomball, Texas and has owned at all times relevant to this action, and  
13 continues to own, the Company's common stock.

#### 14 **B. The Nominal Defendant**

15 13. Nominal Defendant **U.S. Aerospace, Inc.** ("USAE" or the  
16 "Company"), formerly known as New Century Companies, Inc. ("New Century"),  
17 was incorporated in the state of Delaware on August 1, 1980 and is headquartered at  
18 10291 Trademark Avenue, Rancho Cucamonga, California, County of San  
19 Bernardino 91730.

20 14. On October 9, 2009, New Century entered into a share exchange  
21 agreement with Precision Aerostructures, Inc. ("PAI") pursuant to which the  
22 President and sole shareholder of PAI, Michael C. Cabral, agreed to transfer all  
23 capital stock of PAI to New Century. USAE operates through PAI. USAE's  
24 common stock is quoted on the Over-the-Counter Bulletin Board ("OTC Bulletin  
25 Board") under the symbol "USAE". On or about April 19, 2010, the Company  
26 changed its name from New Century Companies, Inc. to U.S. Aerospace, Inc.

27 15. USAE is an aerospace and defense contractor engaged in the  
28 production of aircraft assemblies, structural components, and highly engineered,



1 precision machined details for the United States Department of Defense, United  
2 States Air Force, Lockheed Martin Corporation, The Boeing Company, L-3  
3 Communications Holdings, Inc., the Middle River Aircraft Systems subsidiary of  
4 General Electric Company, and other aircraft manufacturers, aerospace companies,  
5 and defense contractors. The Company supplies structural aircraft parts for military  
6 aircraft such as the P-3 Orion, and wide-body commercial airliners such as the  
7 Boeing 747.

8 **C. Defendants Kirkland And Luce, Forward, Hamilton & Scripps LLP**

9 16. Defendant **John C. Kirkland** is a citizen of the United States of  
10 America, is domiciled in California, is an attorney admitted to practice law in the  
11 State of California, at the time of the filing of this action, was "Of Counsel" with  
12 Defendant Luce and worked from the firm's Los Angeles office. From on or about  
13 February 18, 2009 to March 5, 2011, Defendant Kirkland was a partner of  
14 Defendant Luce. Defendant Kirkland left Luce shortly after the filing of this action.  
15 During the Relevant Time Period, Defendant Kirkland and his law firm, Luce,  
16 served as outside legal counsel to USAE. Defendant Kirkland has been a member  
17 of or associated with at least half a dozen law firms during his legal career,  
18 including: (1) Defendant Luce; (2) Dreier Stein Kahan Browne Woods George; (3)  
19 Lowenstein, Sandler LLP; (4) Greenberg Traurig, LLP, (5) Weissmann Wolff  
20 Bergman Coleman Grodin & Evall LLP; and (6) Cadwalader Wickersham & Taft  
21 LLP. He is also currently the Managing Director at Ironridge Global Partners.

22 17. While a partner at Greenberg Traurig LLP, Defendant Kirkland and the  
23 firm were named in a \$50 million civil suit filed by a mail-order food marketing  
24 company, GreatMeals, USA, Inc. ("GreatMeals"), against former boxing champion  
25 George Foreman over a failed steak venture. The suit claimed that Kirkland  
26 conspired with Foreman to transfer control of certain business opportunities to  
27 Kirkland's brother, Victor Kirkland. GreatMeals also alleged that the defendants  
28 acted with fraud and malice in an attempt to put it out of business by interfering with

1 a valuable contract between GreatMeals and Home Shopping Network.

2 18. Defendant Kirkland joined Defendant Luce in 2009 after leaving Dreier  
3 Stein Kahan Browne Woods George in Los Angeles, an affiliate of Dreier LLP that  
4 broke up in January 2009 after Marc Dreier was charged with impersonating an in-  
5 house lawyer at a Canadian pension fund. Dreier pleaded guilty to selling more than  
6 \$700 million in fictitious real estate development notes and fake pension plan notes.  
7 The elaborate four-year scheme, which netted roughly \$400 million, led to the  
8 implosion of Dreier's 250-attorney firm, Dreier LLP, and its affiliates, including  
9 Dreier Stein Kahan Browne Woods George. Defendant Kirkland was one of two  
10 former partners from Dreier LLP subpoenaed by the firm's liquidating trustee in  
11 May 2009. The Dreier bankruptcy trustee stated in court documents that he  
12 suspected Kirkland may be essentially engaging in misappropriation and fraud. The  
13 trustee stated: "With his new firm [Luce], Mr. Kirkland may even be directing  
14 [former Dreier] clients to pay [Luce] instead of [Dreier]." In his efforts to marshal  
15 assets for the estate, the bankruptcy trustee obtained a court order to examine  
16 Kirkland under oath. The bankruptcy court also issued a subpoena to Luce's  
17 managing partner, ordering the firm to produce documents relating to the Dreier  
18 bankruptcy.

19 19. At the time of the filing of this action, Defendant **Luce, Forward,**  
20 **Hamilton & Scripps LLP** ("Luce") was a limited liability partnership doing  
21 business in California, with offices located in San Diego, San Francisco, Los  
22 Angeles, Orange County, Carmel Valley and Rancho Santa Fe. At the time of the  
23 initiation of this action, each of Luce's ninety-one partners was a citizen of the  
24 United States of America and was domiciled in California. Luce was, therefore, a  
25 citizen of California. On March 6, 2012, Defendant Luce merged with McKenna  
26 Long & Aldridge LLP, and is now known by and rendering professional services  
27 under the name McKenna Long & Aldridge LLP.

28 20. At the time of the filing of this action, Luce's firm website stated:



1 “Luce Forward’s dynamic practice is home to attorneys working in major business  
2 centers throughout California. We are known as a top law firm throughout the state  
3 and represent clients from across the country. For over 135 years, our mission and  
4 values have been our guide.” Luce’s mission included “[d]eliver[ing] dedicated  
5 service at a value that larger firms cannot provide” and “[e]xceed[ing] the high  
6 expectations of sophisticated clients.” Luce’s values included “[t]eamwork, loyalty,  
7 trust, communication and mutual support.”

8 **D. The Former Director Defendants**

9 21. Defendant **Jerrold S. Pressman** is a citizen of the United States of  
10 America, is domiciled in California and has been a member and Chairman of the  
11 USAE Board since April 5, 2010. The principals of ADI directed Defendant  
12 Kirkland and Defendant Charles S. Arnold to select Defendant Pressman as a Board  
13 member. Defendant Pressman was Defendant Kirkland’s client during all relevant  
14 times on unrelated matters. In or about April 2010, Defendant Pressman received an  
15 option to purchase 1 million shares of USAE stock.

16 22. Defendant **Kenneth J. Koock** is a citizen of the United States of  
17 America, is domiciled in New Jersey and has been a Director of USAE since April  
18 5, 2010. The principals of ADI directed Defendants Kirkland and Arnold to select  
19 Defendant Koock as a Board member. In or about April 2010, Defendant Koock  
20 received an option to purchase 1 million shares of USAE stock.

21 23. Defendant **Michael L. Goldberg** is a citizen of the United States of  
22 America, is domiciled in Florida and has been a Director of USAE since April 5,  
23 2010. The principals of ADI directed Defendants Kirkland and Arnold to select  
24 Defendant Goldberg as a Board member. In or about April 2010, Defendant  
25 Goldberg received an option to purchase 1 million shares of USAE stock.

26 24. Defendant **James D. Henderson** is a citizen of the United States of  
27 America, is domiciled in California and has been a Director of USAE since April 5,  
28 2010. The principals of ADI directed Defendants Kirkland and Arnold to select

1 Defendant Henderson as a Board member. In or about April 2010, Defendant  
2 Henderson received an option to purchase 1 million shares of USAE stock.

3 25. Defendants Pressman, Kooock, Goldberg, and Henderson are sometimes  
4 collectively referred to herein as the "Former Director Defendants."

5 **E. Defendant Hal Kolker**

6 26. Defendant **Hal Kolker** was appointed to the USAE Board on March  
7 16, 2011 and was the sole member of the Board upon the filing of the initial  
8 complaint in this action on May 18, 2011. Defendant Kolker is a citizen of the  
9 United States of America and is domiciled in California.

10 **F. Defendant Charles S. Arnold**

11 27. Defendant **Charles S. Arnold** is a citizen of the United States of  
12 America, is domiciled in Florida and is a principal of Summit Trading Limited.  
13 Defendant Arnold and Defendant TUSA share the same address: 520 Brickell Key  
14 Drive, Suite 1607, Miami, Florida 33131.

15 28. Upon information and belief, Defendant Arnold has a pattern and  
16 practice of entering into stock promotion contracts with penny stock companies in  
17 return for a substantial amount of stock in the company. He, along with others,  
18 publishes or promotes positive stories about those fledgling companies and is then  
19 able to reap a windfall when the positive stories spur investors to drive these stock  
20 prices higher.

21 29. On May 21, 2002, a federal grand jury returned an Indictment charging  
22 Defendant Arnold and others with one count of wire, mail and securities fraud  
23 conspiracy, in violation of 18 U.S.C. § 371, thirteen counts of wire fraud, in  
24 violation of 18 U.S.C. §§ 1343 and 1346, one count of mail fraud, in violation of 18  
25 U.S.C. §§ 1341 and 1346, and one count of securities fraud, in violation of 15  
26 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5. Defendant Arnold was a stock promoter  
27 and a controlling shareholder of a company named A1 International, Inc.  
28 ("AWON"), the common stock of which was publicly traded on the over-the-

1 counter market. According to the Indictment, Defendant Arnold and others agreed  
2 to pay an approximately \$2.5 million undisclosed kickback to a confidential  
3 informant for the FBI and others to induce a fictitious foreign mutual fund to buy  
4 approximately 4 million shares of overpriced AWON stock for a total of \$8 million.  
5 Defendant Arnold, however, was ultimately acquitted.

6 **G. The Majority Shareholder Defendants**

7 30. **Defendant TUSA Acquisition Corp. ("TUSA")**, at the time of the  
8 filing of this action, was a holder of 127,931 shares of USAE Series E Preferred  
9 Stock, each of which was convertible into 500 shares of USAE common stock.  
10 TUSA is incorporated in Delaware and its principle place of business is located  
11 (with Defendant Arnold) at 520 Brickell Key Drive, #1607, Miami, Florida 33131.  
12 TUSA's President and stockholder is Daisy Rodriguez, Defendant Arnold's wife.

13 31. **Defendant American Defense Investments, LLC ("ADI")**, at the time  
14 of the filing of this action, held 255,862 shares of USAE Series E Preferred Stock,  
15 each of which was convertible into 500 shares of USAE common stock. ADI is  
16 incorporated in Delaware and its principle place of business is located at 1301 South  
17 75 Street, Suite 100, Omaha, Nebraska. ADI's Managing Director and only member  
18 is Richard N. Berkshire of Berkshire & Burmeister, located at 1301 South 75th St.,  
19 Suite 100, Omaha, Nebraska. Richard N. Berkshire is citizen of the United States of  
20 America and is domiciled in Nebraska. Therefore, ADI is a citizen of Nebraska.

21 32. Defendants TUSA and ADI, by virtue of their conversion rights,  
22 control a majority of the shares of USAE and elect its Board. Defendants TUSA  
23 and ADI are sometimes referred to herein as the "Majority Shareholder  
24 Defendants."

25 **H. The Doe Defendants**

26 33. Plaintiffs do not know the true names and capacities, whether  
27 individual, corporate, associate, or otherwise of defendants Does 1 through 10,  
28 inclusive. Plaintiffs are informed and believe and based upon such information and

1 belief allege that each fictitious defendant was in some way responsible for,  
2 participated in, or contributed to the matter and things of which Plaintiffs complain  
3 herein, and in some form and under some theory, is subject to liability therefore.  
4 When the exact nature and identity of such fictitious defendants' responsibility for,  
5 participation in, and contribution to the matters herein alleged is ascertained,  
6 Plaintiffs will seek leave to amend this Complaint to set forth the same.

#### 7 **IV. SUBSTANTIVE ALLEGATIONS**

8 34. In October 2009, when New Century Companies purchased PAI, New  
9 Century's Board consisted of David Duquette, the President of the Company, and  
10 Josef Czikmantori, the acting Secretary.

11 35. At the time, a New York-based asset management firm owned  
12 approximately \$3.5 million of New Century's debt. Subsequent to New Century's  
13 October 2009 purchase of PAI, Defendants Kirkland and Arnold acquired from the  
14 New York-based asset management firm, for approximately \$100,000, an option to  
15 purchase its debt. Defendants Kirkland and Arnold then approached Mr. Duquette  
16 and Mr. Czikmantori and threatened to foreclose on New Century's debt unless New  
17 Century provided Defendants Kirkland and Arnold with a controlling number of  
18 seats on its Board. Defendants Kirkland and Arnold based these threats, in part, on  
19 the false pretense that they actually owned the debt.

20 36. As a result, on or about April 5, 2010, Mr. Duquette and Mr.  
21 Czikmantori expanded the number of directors on New Century's Board to seven  
22 and appointed six new directors. Of those six new directors, Defendants Pressman,  
23 Koock, Goldberg and Henderson were appointed at the direction of Defendants  
24 Kirkland and Arnold. The principals of ADI directed Defendants Kirkland and  
25 Arnold to select those specific new Board members. Also appointed at that time  
26 were Michael C. Cabral and Randall Humphreys. After passing those resolutions,  
27 Mr. Duquette remained the Company's CEO and kept this seat on the Board, while  
28 Mr. Czikmantori remained Secretary but resigned his Board membership.

1           37. The newly expanded Board met a few days later and, upon information  
2 and belief, passed a resolution providing the Board members with options to  
3 purchase one million shares of USAE common stock at \$0.13 a share. Half of those  
4 options would vest one year from the resolution and the other half would vest a year  
5 later. The Board gave an additional option to purchase 5 million shares to Summit  
6 Trading, owned or controlled by Defendant Arnold,<sup>3</sup> in exchange for unspecified  
7 “investor relations” services. The Board also established Defendant Kirkland and  
8 his law firm, Defendant Luce, as outside counsel and, on or about April 19, 2010,  
9 changed New Century’s name to U.S. Aerospace, Inc.

10           38. Shortly thereafter, Defendant Kirkland spearheaded a transaction in  
11 which the Company sought to purchase Antonov USA from ADI and TUSA.  
12 Defendant Arnold’s wife, Daisy Rodriguez, is the President and stockholder of  
13 TUSA. The supposed purpose of the transaction was for the Company to acquire  
14 Antonov USA’s sole asset, its purported existing relationship with the Antonov  
15 Company, a Ukrainian state-owned company with the capacity to undertake large  
16 aeronautical manufacturing projects.

17           39. On or about July 1, 2010, USAE purchased Antonov USA in exchange  
18 for an aggregate of 383,793 shares of Series E Convertible Preferred Stock with a  
19 par value of \$1.00. Two-thirds of that stock was paid to ADI. Under the governing  
20 documents, the holders could convert each series E share into 500 shares of USAE  
21 common stock. The Series E voted together with the common stock as a single class  
22 on an as-converted basis, and the Series E benefitted from non-dilution protection.  
23 Given the number of circulating common shares, after the purchase of Antonov  
24 USA, the Series E holders, *i.e.*, ADI and TUSA, held the majority of voting shares

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25 <sup>3</sup> Summit Trading Limited is a Bahamian holding company and is owned by  
26 the Weast Family Trust, a private irrevocable trust established for the benefit of  
27 Defendant Arnold, Daisy Rodriguez, Stephanie Kaye and Tracia Fields. Defendant  
28 Arnold is the settler of the Weast Family Trust, and his interest in Summit Trading  
Limited is approximately 80% of the value.



1 in USAE.

2 40. The same day as the Antonov USA purchase, USAE entered into a  
3 Strategic Cooperation Agreement with the Antonov Company.

4 41. On July 6, 2010, the Company filed a report on Form 8-K with the SEC  
5 concerning a press release issued that same day announcing the Company's  
6 "Strategic Cooperation Agreement" with Antonov to bid on a Request for Proposal  
7 ("RFP") from the U.S Air Force for the KC-Y Tanker Modernization Program. The  
8 press release stated, in relevant part:

9  
10 LOS ANGELES—(BUSINESS WIRE)—U.S. Aerospace, Inc.  
11 (OTCBB: USAE), an aerospace and defense contractor, today  
12 announced that it has entered into a Strategic cooperation agreement  
13 with Antonov to bid on the request for proposal to supply 179 aerial  
14 refueling tankers to the U.S. Air Force.

15 The airframes will be built in Ukraine by Antonov, with final assembly  
16 at a new U.S. Aerospace, Inc. facility in the United States. The KC-X  
17 Tanker Modernization Program, expected to be the largest contract in  
18 Pentagon history, represents the first step of the strategic cooperation  
19 between Antonov and U.S. Aerospace, Inc. to supply and service  
20 aircraft to the U.S. military and commercial aircraft markets.

21 Antonov designed, built and operates the world's largest aircraft, the  
22 AN-225, which provides strategic airlift capabilities for the U.S.  
23 Department of Defense and others. Antonov and U.S. Aerospace, Inc.  
24 will bid three models for the KC-X program, the AN-124-KC, AN-122-  
25 KC, a twin-engine variant of the AN-124-100 with advanced engines,  
26 electronics and avionics, and AN-112-KC, an updated airframe  
27 designed specifically to meet the tanker program requirements.  
28



1 “Antonov’s participation in the U.S. Air Force tanker bid with U.S.  
2 Aerospace, Inc. is an historic opportunity for Antonov to showcase its  
3 premier design, engineering and manufacturing capabilities to the  
4 world,” said Dmytro S. Kiva, President and General Designer of  
5 Antonov. “We are extremely pleased to have entered into this  
6 agreement with U.S. Aerospace, Inc., and are looking forward to the  
7 long-term mutual benefits of our partnership.”

8 “We are honored to be partnering with the world’s premier designer  
9 and manufacturer of large transport aircraft,” said Jerrold S. Pressman,  
10 Chairman of U.S. Aerospace, Inc. “We are particularly impressed by  
11 Mr. Kiva’s strong leadership and vision for the future. Together we can  
12 deliver the U.S. Air Force a superior tanker at the most competitive  
13 price.”

14 USAE, Current Report (Form 8-K), at Ex. 1 (July 6, 2010).

15 42. On or about July 9, 2010, USAE submitted a response to the RFP,  
16 under which the aircraft components would have been built by Antonov Company in  
17 the Ukraine, with final assembly by USAE. Since the U.S. Air Force denied the  
18 Company’s request for an extension of the bidding deadline on July 8, 2010, the  
19 Company bid only one model of aircraft, the AN-112KC.

20 43. The Boeing Company and The European Aeronautic Defense and  
21 Space Company N.V., also bid on the RFP utilizing existing wide body commercial  
22 airliners as the basis for their KC-X tanker proposals. Both designs were advanced  
23 and well developed, and both companies invested considerable resources into  
24 designing their tankers and in preparing their responses to the RFP. Both companies  
25 spent substantially more time, money and effort preparing their RFP responses than  
26 USAE did.

27 44. Ultimately, the Air Force found USAE’s bid untimely and failed to  
28

1 consider it. On August 2, 2010, the Company submitted a bid protest to the General  
2 Accounting Office (“GAO”). On October 6, 2010, the GAO denied the Company’s  
3 bid protest. USAE and the Antonov Company have yet to submit a successful bid  
4 together, and, ultimately, the Company recorded an impairment charge equal to the  
5 net book value of the Strategic Cooperation Agreement with Antonov.

6 45. On or about July 14, 2010, a company called Omnicom filed a  
7 complaint against USAE alleging that in June 2010, USAE entered into an  
8 agreement with Omnicom to facilitate USAE’s introduction to the Antonov  
9 Company (the “Omnicom Complaint”). Allegedly, the terms of the contract  
10 obligated USAE to pay a \$1.5 million fee due within forty-eight hours after  
11 completion of a cooperation agreement between the Antonov Company and USAE,  
12 and another \$1.5 million upon the consummation of a successful bid resulting from  
13 that agreement. At the time, USAE had insufficient funds to pay that fee, and did  
14 not anticipate obtaining such a significant sum anytime soon thereafter. Defendant  
15 Kirkland was purported to have participated in negotiating the Omnicom agreement.

16 46. According to Omnicom’s allegations, the contract was memorialized by  
17 a single letter of acknowledgement, dated June 4, 2010, purportedly sent by  
18 Omnicom CEO, Mark Suleymanov, to Board member Jerrold Pressman, who, upon  
19 information and belief, was at the time and continues to be a client of Defendant  
20 Kirkland on other unrelated matters. The Omnicom Complaint failed to allege any  
21 specific actions taken by Omnicom in performance of the alleged contract with  
22 USAE, much less explain why such actions constituted fair value for \$3 million.

23 47. Regardless, on July 15, 2010, ***one day after the filing of the Omnicom***  
24 ***Complaint***, Defendant Kirkland and Defendant Pressman entered into a settlement  
25 agreement with Omnicom on behalf of USAE. The settlement was a “pre-  
26 packaged” transaction, agreed to even before the Complaint was filed, to facilitate  
27 the issuance of free-trading shares. Under the terms of the settlement agreement,  
28 Omnicom received 15 million free-trading shares of USAE common stock. At that

1 time, 15 million shares of USAE common stock held a value of approximately \$2.3  
2 million. The settlement agreement specifically excluded from its release any  
3 subsequent claim by Omnicom that it was entitled to another \$1.5 million in the  
4 event that the Company and the Antonov Company were successful in bidding on  
5 the project. Furthermore, Omnicom was represented in the litigation against USAE  
6 by attorney Matthew B. Gruenberg, a solo practitioner based in Santa Monica,  
7 California, who had been an associate with Drier LLP at the time Kirkland was a  
8 partner with that now-defunct firm. Mr. Gruenberg also represents Defendants  
9 Pressman in other litigation where Defendant Pressman is being sued for investment  
10 fraud. The Omnicom settlement agreement was not submitted to the Company  
11 Board for approval before it was executed.<sup>4</sup>

12 48. On or about August 11, 2010, USAE's Board of Directors post-hoc  
13 ratified the Omnicom settlement agreement and Defendant Kirkland's role in  
14 approving the settlement. In that same resolution, the Board accepted Mr.  
15 Duquette's resignation as CEO and as a Board member, effective August 16, 2010,  
16 and appointed James Worsham to the Board and as the Company's new CEO,  
17 effective September 29, 2010. Mr. Czikmantori also resigned as Secretary effective  
18 August 16, 2010. Michael C. Cabral was appointed President effective August 23,  
19 2010.

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20  
21 <sup>4</sup> The Company's Form 10-Q/A for the period ending June 30, 2010, dated  
22 September 13, 2010, filed with the SEC discloses:

23 On August 20, 2010, we instructed our transfer agent to issue 5 million  
24 shares and agreed to issue an additional 10 million shares to Omnicom  
25 Holdings pursuant to a stipulated settlement in an action filed by  
26 Omnicom for a \$1.5 million commission claimed due in connection  
27 with our agreement with Antonov. The issuance was exempt from  
28 registration pursuant to Section 3(a)(10) of the Securities Act as an  
issuance approved by a court after a hearing upon the fairness of its  
terms and conditions.

USAE, Quarterly Report (Form 10-Q/A), at F-22 (September 13, 2010).

1        49. Following the Omnicom settlement, 4.55 million shares of stock  
2 initially issued to Omnicom were then reissued to a number of other entities,  
3 including Zynatech, Aegis Capital, Adanta Partners, Omnivest Holdings, Net Gen,  
4 Oceanic Consulting, Insight Capital Consultants and James Meagher at the direction  
5 of Tom Biggs and Dick Fixaris, employees of Defendant Arnold. At least one of  
6 those companies had a pre-existing relationship with USAE.

7        50. The Company's report on Form 10-Q for the period ending September  
8 30, 2010 reported,

9        Operating loss for the three and nine months ended September 30,  
10        2010, was \$12,156,947 and \$14,235,297 compared to \$66,166 and  
11        \$108,525 for the three and nine months ended September 30, 2009. ***The***  
12        ***increase in loss of \$12,090,781 and \$14,126,772, respectively, is***  
13        ***primarily due to the impairment charge for the Strategic Cooperation***  
14        ***Agreement***, the acquisition of PAI, the reclassification of NCR as a  
15        discontinued operation ***and due to increased consulting services for***  
16        ***new aerospace marketing and service contracts.***

17        USAE, Quarterly Report (Form 10-Q), at \*4 (December 16, 2010) (emphasis  
18 added). The 10-Q goes on to report that \$11,513,790 of this loss for the nine  
19 months ended September 30, 2010 was due to a "non-cash expense for impairment  
20 of an intangible asset", that \$319,319 of the loss was from "stock issued for  
21 services," and another \$1,500,000 of the loss was due to "stock issued for the  
22 settlement of a liability...."

23        51. By December 2010, USAE required further financing to remain a going  
24 concern. The sole potential funding offer to USAE came from the same New York-  
25 based asset management firm that had extended credit, as discussed above. The  
26 tentative proposed terms were beneficial to the Company, but required the Company  
27 to terminate the rights of the Series E holders in order to encourage further  
28 investment by market participants who otherwise would shy away from a company

1 controlled by the Series E holders.

2 52. When informed of the proposed lender's terms, Defendant Kirkland  
3 unilaterally rejected the proposed funding on behalf of the Company. Further,  
4 Defendant Kirkland asserted that he would prefer placing the Company into  
5 bankruptcy rather than accept the funding under the premise that the Series E  
6 holders could emerge from the proceedings owning a shell company containing the  
7 necessary licenses to enter into government contracts as well as the cooperation  
8 agreement with the Antonov Company.

9 53. Defendant Kirkland attempted to effect this purported rejection without  
10 consulting with the Board or the Company's CEO, Mr. Worsham. The Company's  
11 financial situation became increasingly precarious. Evidently, Defendant Kirkland  
12 and the Series E holders are in fact resigned to placing the Company in bankruptcy.  
13 Mr. Worsham and the Company, however, believe that with financing, USAE can  
14 avoid bankruptcy, become profitable, and protect the interests of the common  
15 shareholders and USAE's creditors.

16 54. In late 2010, Mr. Worsham retained the law firm of Akin Gump Strauss  
17 Hauer & Feld LLP ("Akin Gump") to investigate Defendant Kirkland's actions.  
18 The Former Director Defendants were unaware that Akin Gump had been engaged  
19 by Mr. Worsham to conduct an investigation into their conduct and that of  
20 Defendant Kirkland.

21 55. On January 26, 2011, Akin Gump produced a memorandum (the "Akin  
22 Gump Memo") describing misconduct by Kirkland and his colleagues, concluding  
23 that Kirkland had placed his own interests and those of the Majority Shareholder  
24 Defendants ahead of the interests of the Company, in violation of his professional  
25 and fiduciary duties. The Akin Gump Memo recommended that, at a minimum,  
26 Kirkland and his colleagues be divested of their duties.

27 56. On January 27, 2011, following Mr. Worsham's dissemination of the  
28 Akin Gump Memo to the Board, Mr. Worsham, Mr. Cabral and independent



1 Director Randall Humphreys were removed, without cause, from USAE's Board by  
2 Stockholder Written Consent signed by Richard Berkshire on behalf of Defendant  
3 ADI. Mr. Cabral was also removed as President of the Company at a January 28,  
4 2011 Board meeting. Mr. Worsham resigned a short time later by letter dated  
5 February 11, 2011, citing his opposition to Defendant Kirkland's conduct.

6 57. On January 28, 2011, the Company filed form 15-12G with the SEC to  
7 deregister its stock. It reported a net loss for the quarter ended September 30, 2010,  
8 of \$11.5 million on revenue of \$660,144.

9 58. In an attempt to exculpate themselves from any claims of illegal  
10 activity, breach of fiduciary duty or the like, Defendants Arnold, Goldberg, Koock  
11 and Henderson enlisted the help of Defendant Kolker and purportedly each entered  
12 into a "Mutual General Release" (the "Releases"). Defendant Kolker was the only  
13 counterparty signatory to the individual Releases, signing on behalf of both USAE  
14 and PAI. The releases were drafted in the broadest possible terms to release the  
15 covered Defendants from liability for *"any and all causes of action, rights,*  
16 *obligations, damages, liabilities and claims of any kind or nature whatsoever, at law*  
17 *and in equity, including without limitation all possible claims for breach of contract,*  
18 *quantum meruit, breach of fiduciary duty, aiding and abetting, fraud, negligent*  
19 *misrepresentation, wrongful termination, discrimination, sexual harassment,*  
20 *corporate waste, misappropriation, intentional misconduct, professional*  
21 *misconduct, malpractice, professional negligence, negligence, unpaid fees, salary,*  
22 *wages, vacation and overtime, and all claims in any way arising out of or relating to*  
23 *any relationship or dealings involving any of the USAE Parties (defined below) and*  
24 *any of the Shareholder Parties (collectively, "Claims").*" As the Releases state, it  
25 was "the parties' intention to fully, finally and forever settle, release and resolve all  
26 claims, regardless of whether known or unknown, foreseen or unforeseen, suspected  
27 or unsuspected, vested or contingent, accrued or unaccrued."

28 59. There is no indication of what consideration, if any, was given in return



1 for these extremely broad Releases executed in favor of Defendants, Arnold,  
2 Goldberg, Koock and Henderson. More importantly, the timing of the Releases  
3 themselves indicates a serious lack of trustworthiness. The Releases were  
4 purportedly executed on April 29, 2011, after the Akin Gump Memo had been  
5 issued and circulated and just before the filing of this lawsuit. Therefore, at the  
6 purported time of the signing of the Releases, Defendants well-knew that they were  
7 likely to become defendants in a lawsuit in the very near future.

8 60. In addition, it would be subjectively and objectively unreasonable for  
9 any person or persons, acting on behalf of USAE, to give up the right to investigate  
10 and prosecute potentially meritorious claims on behalf of the Company against the  
11 Former Director Defendants. However, because of his personal and business  
12 dealings with the Former Director Defendants, it was in Defendant Kolker's self-  
13 interest to attempt to exculpate the former Board members, rather than act on the  
14 wrongdoing alleged herein.

15 61. In light of the serious nature of the breaches of fiduciary duty alleged  
16 herein, the execution of the Releases represents an independent, actionable breach of  
17 fiduciary duty. Additionally, because Defendant Kolker is an interested and  
18 conflicted party who is beholden to Defendants Kirkland and Arnold—due to  
19 extensive personal and financial ties—it would be impossible for him to act in a  
20 reasonable and/or objective manner. As such, the Releases are the product of fraud  
21 and are invalid and unenforceable.

22 62. Defendant Kolker also executed releases benefiting ADI and TUSA,  
23 which were substantially the same as those entered into with Defendants Arnold,  
24 Goldberg, Koock and Henderson. The releases that were executed on behalf of ADI  
25 and TUSA suffer from the same infirmities as the other Releases, *i.e.*, they are  
26 unreasonable and the product of Defendant Kolker's self-interested desire to  
27 exculpate his business associates and friends. In addition, while the ADI and TUSA  
28 releases recite the inclusion of consideration on behalf of the "Releasees," that

1 consideration was likely worthless at the time of the signing of the contracts. As the  
2 ADI and TUSA releases provide, both entities agree to the quitclaiming of “[t]wenty  
3 thousand (20,000) shares of Series E Convertible Preferred Stock ... convertible into  
4 10,000,000 shares of Common Stock.” However, the shares purportedly  
5 quitclaimed were virtually worthless on the purported date of the release, April 29,  
6 2011, due to the lack of a market.<sup>5</sup> Also, as discussed herein, the Series E shares  
7 that ADI and TUSA claimed to be relinquishing were fraudulently granted in the  
8 first place and therefore were not the legal property of those entities, rendering the  
9 Releases void as the product of fraud and for lack of valid consideration.

10 63. By the actions alleged herein, Defendant Kirkland and, vicariously,  
11 Defendant Luce violated their professional responsibilities and fiduciary duties  
12 owed to USAE as USAE’s outside general counsel. Defendant Kirkland has  
13 consistently placed his own interests and the objectives of other individuals before  
14 those of his client and acted well beyond the scope of his authority. Defendant  
15 Kirkland also violated his fiduciary duties of loyalty, good faith and care to the  
16 Company and aided and abetted similar breaches of duty by the Former Director  
17 Defendants and the Majority Shareholders.

18 64. The Former Director Defendants have similarly breached their  
19 fiduciary duties of care and loyalty and have aided and abetted Defendants Kirkland  
20 and Luce’s breaches of fiduciary duty. The Former Director Defendants have  
21 abdicated their responsibility to adequately monitor USAE’s business dealings and  
22 oversee Defendants Kirkland and Luce.

23 65. Further, the Majority Shareholders, ADI and TUSA, which control a  
24

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25 <sup>5</sup> Yahoo finance reports that the adjusted stock price of USAE common stock  
26 on April 29, 2011 was \$0.01. However, the volume on that day was only 55,000  
27 shares and the volume for the two preceding days was 9,500 and 13,000  
28 respectively. With such small volume it is unlikely that ADI or TUSA would have  
been able to sell any of the convertible shares, even if they were given the  
opportunity to do so.

1 majority of the USAE Board, have breached and continue to breach their fiduciary  
2 duties owed to the Company and the minority shareholders by insisting that the  
3 Company be placed into bankruptcy rather than accept financing which could allow  
4 the Company to become profitable and protect the interests of the common  
5 shareholders and USAE's creditors.

6 66. Defendant Arnold has aided and abetted each of the foregoing breaches  
7 of fiduciary duty by Defendants Kirkland and Luce, the Former Director Defendants  
8 and the Majority Shareholder Defendants.

9 **V. DERIVATIVE ACTION AND DEMAND EXCUSED ALLEGATIONS**

10 67. Plaintiffs bring this action derivatively, in the right and for the benefit  
11 of the Company, to redress Defendants' breaches of fiduciary duties, and  
12 Defendants Kirkland and Luce's legal malpractice.

13 68. Plaintiffs are owners of USAE common stock and were owners of  
14 USAE common stock at all relevant times hereto.

15 69. Plaintiffs will adequately and fairly represent the interests of the  
16 Company and its shareholders in enforcing and prosecuting its rights.

17 70. As a result of the facts set forth herein, Plaintiffs have not made any  
18 demand on the Board to institute this action against Defendants. Such demand  
19 would be a futile and useless act because a majority of the members of the Board are  
20 incapable of making an independent and disinterested decision to institute and  
21 vigorously prosecute this action.

22 71. At the time of the breaches of fiduciary duty alleged herein, the USAE  
23 Board consisted of Mr. Cabral, Mr. Humphreys, Defendant Goldberg, Defendant  
24 Henderson, Defendant Koock and Defendant Pressman. Defendants Goldberg,  
25 Henderson, Koock and Pressman were each hand-picked by Defendant Kirkland at  
26 the direction of Defendant ADI, a majority shareholder of the Company. Defendant  
27 ADI owns two-thirds of the Series E Convertible Preferred Stock of the Company.  
28 Together with TUSA, ADI owns a majority of the voting shares in USAE. As a

1 result, four (4) of the six (6) directors in place at the time of the transactions  
2 described herein were controlled by, and beholden to, Defendants Kirkland and  
3 ADI. Therefore, a majority of the Board was conflicted and entangled with and  
4 controlled and dominated by Defendants Kirkland, Luce and ADI, preventing them  
5 from fairly considering, let alone taking, all necessary and proper action on the  
6 Company's behalf.

7 72. Likewise, demand would have been futile if it had been made on the  
8 date of filing of this action. On May 18, 2011, the USAE Board consisted of one  
9 person, Defendant Hal Kolker. Defendant Kolker is a long-time associate and  
10 business partner of Defendants Arnold and Kirkland. In early 2010, Defendants  
11 Arnold and Kirkland introduced Defendant Kolker to USAE in order that Defendant  
12 Kolker might provide financing to the Company. Defendants Arnold and Kirkland  
13 represented to USAE's then Chief Executive Officer, David Duquette, that  
14 Defendant Kolker had previously engaged in a number of business deals with  
15 Arnold and Kirkland. While Defendant Kolker did not invest in the Company at  
16 that time, he was later personally selected by Defendants Kirkland and Arnold to  
17 represent their interests—not the interests of the Company—after the ouster of the  
18 Board in 2011.

19 73. The most striking illustration of Defendant Kolker's allegiance to the  
20 Defendants' interests is his willingness to execute the Releases, which purport to  
21 exculpate Defendants Arnold, Goldberg, Henderson, Koock, ADI and TUSA.  
22 Because the consideration for those Releases is either nonexistent or essentially  
23 worthless, the Releases served no cognizable business interest. In addition, the  
24 purported timing of the signing of the Releases—after the Akin Gump letter was  
25 circulated and just before this action was filed—suggests that Defendant Kolker  
26 intended to protect the Defendants, to the detriment of the Company. Nevertheless,  
27 because USAE's applicable corporate governance documents do not provide for the  
28 maintenance of a one person Board, it is unlikely that Defendant Kolker had the

1 authority or ability to enter into the Releases on behalf of the Company. Most  
2 importantly, Defendant Kolker's relationship with Defendant Kirkland and Arnold  
3 necessarily renders him interested and biased, rendering the Releases void and  
4 unenforceable. Defendant Kolker's willingness to enter into the Releases, which  
5 serve no reasonable business purpose, demonstrates his inability to objectively judge  
6 a litigation demand.

7 74. Any demand made pursuant to Rule 23.1 of the Chancery Court Rules  
8 would have been futile as of the filing of this action on May 18, 2011, given the fact  
9 that: (a) Defendant Kolker has prior business and personal dealings with other  
10 Defendants, including Defendants Arnold and Kirkland, and therefore cannot be  
11 considered independent; and (b) Defendant Kolker's actions while serving as the  
12 solitary Board member of USAE, including the signing of the Mutual General  
13 Releases, demonstrate that he was beholden to Defendants.

14 75. Demand is also excused because the underlying transactions  
15 complained of herein were not and could not have been the product of a valid  
16 exercise of business judgment.

17 76. Demand is also excused because the wrongs alleged herein constitute  
18 violations of the fiduciary duties owed by the Former Director Defendants and  
19 Defendant Kolker and are incapable of ratification by the current Board. The  
20 Former Director Defendants and Defendant Kolker are subject to liability for  
21 breaching their fiduciary duties to USAE and aiding and abetting breaches of  
22 fiduciary duty by the other defendants by, *inter alia*, failing to adequately monitor  
23 USAE's business dealings and oversee Defendants Kirkland and Luce.

## 24 **COUNT I**

### 25 **Against Defendants Kirkland And Luce For Legal Malpractice**

26 77. Plaintiffs reallege the foregoing paragraphs as though fully set forth  
27 herein.

28 78. By accepting his position as USAE's outside general counsel,



1 Defendant Kirkland obligated himself to “conform his ... representation to the  
2 concept that the client is the organization itself, acting through its highest authorized  
3 officer, employee, body, or constituent overseeing the particular engagement.” Cal.  
4 Rules Prof’l Conduct R. 3-600; *see also* Model Rules Prof’l Conduct R. 1.2 (“[A]  
5 lawyer shall abide by a client’s decisions concerning the objectives of representation  
6 and, as required by Rule 1.4, shall consult with the client as to the means by which  
7 they are to be pursued.”) Defendant Kirkland, however, consistently placed the  
8 objectives of the Series E holders, *i.e.*, ADI, TUSA and their affiliates, before the  
9 well-being of the Company, in violation of his ethical duties.

10 79. Defendant Kirkland’s continued representation and/or affiliation with  
11 ADI and its interests constituted conflicts which should have precluded him from  
12 representing the Company. Defendant Kirkland cannot ethically allow his  
13 representation of the Company to be directed by a client with adverse interests.  
14 Defendant Kirkland’s loyalty to the Series E holders rather than to the Company has  
15 caused, and continues to cause, USAE significant material harm. For example,  
16 Defendant Kirkland, acting at the behest of ADI, prevented the Company from  
17 considering essential funding offered by Centrecourt because its terms included the  
18 limitation of the Series E stock. Defendant Kirkland’s preference for placing the  
19 Company into bankruptcy under the theory that the Series E holders would emerge  
20 as the owners of important USAE assets further underscores this conflict.

21 80. The California Bar Association, of which Defendant Kirkland is a  
22 member, proscribes the continued representation of a client in the face of such a  
23 conflict. *See* Cal. Rules of Prof’l Conduct, Rule 3-310(C) (“A member shall not,  
24 without the informed written consent of each client: (1) Accept representation of  
25 more than one client in a matter in which the interests of the clients potentially  
26 conflict; or (2) Accept or continue representation of more than one client in a matter  
27 in which the interests of the clients actually conflict....”). Defendant Kirkland never  
28 provided the Company with notice of his existing conflict. Even so, such notice and



1 consent could not absolve Defendant Kirkland of his ethical duty to pursue his  
2 client's objectives rather than those of another.

3 81. Defendant Kirkland similarly violated California Rules of Professional  
4 Conduct, Rule 3-310(B), which states that "[a] member [of the Bar] shall not accept  
5 or continue representation of a client without providing written disclosure to the  
6 client where: ... (3) [t]he member has or had a legal, business, financial,  
7 professional, or personal relationship with another person or entity the member  
8 knows or reasonably should know would be affected substantially by resolution of  
9 the matter; or (4) [t]he member has or had a legal, business, financial, or  
10 professional interest in the subject matter of the representation." *See also* Model  
11 Rules of Prof'l Conduct R. 1.7 ("a lawyer shall not represent a client if the  
12 representation involves a concurrent conflict of interest"). Defendant Kirkland  
13 never attempted to provide such disclosure to the Company, which in any event  
14 would have been inadequate.

15 82. Defendant Kirkland's professional relationship with ADI obligated him  
16 to discontinue his representation of the Company. Under California Rules of  
17 Professional Conduct, Rule 3-300, "[a] member shall not enter into a business  
18 transaction with a client; or knowingly acquire an ownership, possessory, security,  
19 or other pecuniary interest adverse to a client...."

20 83. The California Rules of Professional Conduct prohibited Defendant  
21 Kirkland from participating in USAE's purchase of Antonov USA. In that  
22 transaction, Defendant Kirkland did disclose his conflict to the Board, which  
23 purported to waive any such conflict on behalf of the Company. However, even if  
24 the Board were empowered to waive a conflict regarding the Company's counsel,  
25 the majority of the Board members were appointed by ADI and therefore were  
26 hopelessly conflicted in the transaction. The interested directors should have  
27 recused themselves from participating in the vote. Moreover, the purchase involved  
28 the effective sale of control over the Company to another of Defendant Kirkland's

1 clients and/or related parties. Defendant Kirkland therefore should not have asked  
2 for, or accepted, a waiver concerning such a clear conflict. Instead, he should have  
3 advised his client to obtain separate counsel to explore whether the transaction  
4 benefitted the Company and its shareholders, or just ADI and the ADI-appointed  
5 Board members.

6 84. Defendant Kirkland also breached his ethical duties by failing to  
7 consult or take direction from his client on important matters. Defendant Kirkland  
8 adopted a role beyond that of outside general counsel by immersing himself in the  
9 day-to-day management of the Company at ADI's behest. In the context of the  
10 funding offer, it was beyond Defendant Kirkland's duties as general counsel to take  
11 action without direction from the Company through its highest authorized officer,  
12 James Worsham. *See* Cal. Rules of Prof'l Conduct, Rule 3-600. After receiving  
13 such direction, Mr. Kirkland should have vigorously defended USAE's position,  
14 whether or not he agreed with it, rather than promoting the position of the Series E  
15 holders.

16 85. Defendant Kirkland also violated his ethical duties by failing to inform  
17 the Company about the Omnicom settlement offer, let alone seek direction regarding  
18 whether the offer was sufficiently advantageous. *See* Cal. Rules of Prof'l Conduct,  
19 Rule 3-510.

## 20 COUNT II

### 21 **Against Defendants Kirkland And Luce, The Former Director Defendants,** 22 **Defendant Kolker And The Majority Shareholder Defendants For Breach Of** 23 **Fiduciary Duty And Aiding And Abetting; And Against Defendant Arnold For** 24 **Aiding And Abetting**

25 86. Plaintiffs reallege the foregoing paragraphs as though fully set forth  
26 herein.

27 87. Defendants agreed to and did participate with and/or aided and abetted  
28 one another in a deliberate course of action designed to divert corporate assets in  
breach of fiduciary duties they owed to the Company.

1           88. Defendants have violated fiduciary duties of care, loyalty, good faith,  
2 and independence owed to USAE and its public shareholders, have engaged in  
3 unlawful self-dealing and have acted to put their personal interest and/or their  
4 colleagues' interests ahead of the interests of USAE and its shareholders.

5           89. Defendants Kirkland and Luce owed a fiduciary duty to USAE  
6 stemming from Defendant Kirkland's position as outside general counsel and from  
7 his activities in managing the Company's operations. Defendant Kirkland assumed  
8 an affirmative duty to protect the interest of the Corporation, but also an obligation  
9 to refrain from conduct which would injure the corporation and its stockholders or  
10 deprive them of profit or advantage.

11           90. The Former Director Defendants at all relevant times owed a duty of  
12 loyalty to USAE and its shareholders, including a duty to be independent and  
13 motivated by neither self-interest nor ill will. The Former Director Defendants  
14 breached this duty.

15           91. The Former Director Defendants at all times placed their own interests  
16 and interests of outside parties before the interests of USAE and its shareholders.  
17 The Former Director Defendants approved and/or ratified the transactions that  
18 resulted in the transfer of significant numbers of shares to the Majority Shareholder  
19 Defendants for inadequate consideration to USAE.

20           92. The Former Director Defendants gave Summit Trading, a company  
21 controlled by Defendant Arnold, an option to purchase 5 million shares of USAE for  
22 no consideration to USAE.

23           93. The Former Director Defendants approved and/or ratified the sham  
24 settlement with Omnicom that resulted in millions of shares of USAE being  
25 transferred to outside parties for no consideration to USAE.

26           94. The Former Director Defendants approved and/or ratified Defendant  
27 Kirkland's decision to reject crucial financing needed to keep USAE a going  
28 concern, thereby approving and/or ratifying, or taking no action to prevent actions

1 that placed USAE in imminent danger of insolvency.

2 95. The Majority Shareholder Defendants at all times placed their own  
3 interests and interests of outside parties before the interests of the minority  
4 shareholders.

5 96. Defendant Arnold aided and abetted the foregoing breaches of fiduciary  
6 duties. Defendant Arnold had actual knowledge of all of Defendant Kirkland's and  
7 the Director Defendant's breaches of fiduciary duty. Defendant Arnold, along with  
8 Defendant Kirkland, misrepresented to the Company that Defendants Arnold and  
9 Kirkland owned certain USAE debt which was actually owed by Centrecourt.

10 97. Defendant Arnold, along with Defendant Kirkland and at the behest of  
11 ADI, directed the Company to expand the Board and to appoint four of the Former  
12 Director Defendants to the USAE Board. The Former Director Defendants installed  
13 by Defendant Arnold then granted Defendant Arnold's company, Summit Trading,  
14 an option to purchase 5 million shares of USAE for no consideration.

15 98. Defendant Arnold also assisted in engineering a transaction in which  
16 USAE purchased Antonov USA from ADI and TUSA, resulting in ADI and TUSA  
17 owning the majority of the voting shares in USAE. Defendant Arnold's wife is the  
18 President of TUSA. Defendant Arnold knew that Defendant Kirkland was placing  
19 his interests and those of the Majority Shareholder Defendants above those of USAE  
20 and its common shareholders and knew that USAE was to receive inadequate  
21 consideration for the transaction.

22 99. Moreover, Defendant Arnold had actual knowledge that Defendant  
23 Kirkland and Defendant Pressman engineered the sham settlement with Omnicom.  
24 Defendant Arnold directed his employees to re-issue a substantial portion of the  
25 stock issued to Omnicom to a series of other entities.

26 100. Finally, in light of the serious nature of the breaches of fiduciary duty  
27 alleged herein, the execution of the Releases, as described herein, by Defendant  
28 Kolker, purportedly on behalf of the Company, in an attempt to release Defendants

1 Arnold, Goldberg, Henderson, Kooock, and ADI from all liability, represents an  
2 independent, actionable breach of fiduciary duty.

3 101. As a proximate result of Defendants' conduct, USAE has been injured  
4 and is entitled to damages.

5 **COUNT III**  
6 **Against Defendants Kirkland And Luce And The Former Director Defendants**  
7 **For Corporate Waste**

8 102. Plaintiffs reallege the foregoing paragraphs as though fully set forth  
9 herein.

10 103. Corporate waste is defined as an exchange of corporate assets for  
11 consideration so disproportionately small as to lie beyond the range at which any  
12 reasonable person might be willing to trade.

13 104. There was no substantial consideration received by the Company in  
14 exchange for the Series E Convertible Preferred Stock issued to ADI and TUSA.

15 105. There was no substantial consideration received by the Company in  
16 exchange for the shares issued to Omnicom in connection with the Omnicom  
17 settlement.

18 106. There was no substantial consideration received by the Company in  
19 exchange for the option to purchase 5 million shares of USAE granted to Summit  
20 Trading, a company controlled by Defendant Arnold.

21 107. Under the circumstances, no reasonable business person could conclude  
22 that the aforementioned transactions were worthwhile for the Company and in the  
23 Company's best interests.

24 108. Defendants Kirkland and Luce and the Former Director Defendants are  
25 therefore guilty of committing corporate waste and are liable to the Company for all  
26 damages sustained thereby.

27 **PRAYER FOR RELIEF**

28 WHEREFORE, Plaintiffs demand judgment as follows:

A. Against all of the Defendants and in favor of the Company for the

1 amount of damages sustained by the Company as a result of Defendants'  
2 misconduct;

3 B. Granting appropriate equitable relief to remedy Defendants' breaches  
4 of fiduciary duties;

5 C. Awarding to Plaintiffs, the costs and disbursements of the action,  
6 including reasonable attorneys' fees, experts' fees, costs, and expenses; and

7 D. Granting such other and further relief as the Court deems just and  
8 proper.

9 **JURY TRIAL DEMAND**

10 Plaintiffs demand a trial by jury.

11 DATED: May 22, 2012

WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP  
Francis M. Gregorek  
Betsy C. Manifold  
Rachele R. Rickert  
Patrick H. Moran

15 

16 Rachele R. Rickert

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23 Attorneys for Plaintiffs

24  
25  
26  
27  
28 USAE:18175.CPT



VERIFICATION

I, David L. Defrees, am a party to this action. I hereby verify that I have read the foregoing Verified First Amended Derivative Complaint, know its contents and authorized its filing. The matters stated in the Verified First Amended Derivative Complaint are true based on my own knowledge, except as to those matters stated on information and belief, and as to those matters I believe them to be true.

I verify under penalty of perjury that the foregoing is true and correct.

DATE: May 22, 2012

A handwritten signature in dark ink, appearing to read "David L. Defrees", is written over a horizontal line.

VERIFICATION

I, Simon Gershon, am a party to this action. I hereby verify that I have read the foregoing Verified First Amended Derivative Complaint, know its contents and authorized its filing. The matters stated in the Verified First Amended Derivative Complaint are true based on my own knowledge, except as to those matters stated on information and belief, and as to those matters I believe them to be true.

I verify under penalty of perjury that the foregoing is true and correct.

DATE: May 21, 2012

  
SIMON GERSHON

VERIFICATION

I, Frederick Rich, am a party to this action. I hereby verify that I have read the foregoing Verified First Amended Derivative Complaint, know its contents and authorized its filing. The matters stated in the Verified First Amended Derivative Complaint are true based on my own knowledge, except as to those matters stated on information and belief, and as to those matters I believe them to be true.

I verify under penalty of perjury that the foregoing is true and correct.

DATE: May 21, 2012

  
FREDERICK RICH

DECLARATION OF SERVICE

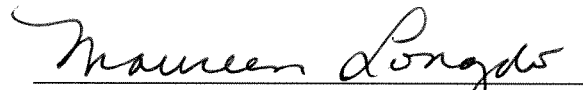
I, Maureen Longdo, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 750 B Street, Suite 2770, San Diego, California. 92101.

2. That on May 22, 2012, declarant served the VERIFIED FIRST AMENDED DERIVATIVE COMPLAINT via Federal Express Overnight Delivery in a sealed envelope fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed this 22nd day of May 2012, at San Diego, California.

  
MAUREEN LONGDO

USAE, INC. DERIVATIVE ACTION  
Service List – June 2, 2010  
Page 1

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USAE, INC. DERIVATIVE ACTION  
Service List – June 2, 2010  
Page 2

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